

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

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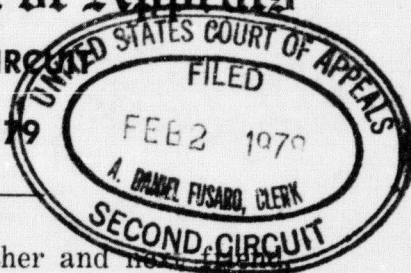
To be argued by
ELAINE C. BUCK

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6179



EARL P. HOPPER, JR., by his father and next friend,
Earl P. Hopper, Sr., et al.,
Plaintiffs-Appellants,
—against—

JAMES E. CARTER, JR., President of the
United States, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANTS-APPELLEES

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BRIEF FOR THE DEFENDANTS-APPELLEES

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Weinstein, J.) denying plaintiffs' motion for a preliminary injunction enjoining the operation of sections 555 and 556 of Title 37 of the United States Code, which govern the circumstances under which servicemen missing in action may be declared dead for purposes of military pay and death gratuities. The order was entered by the Clerk of the District Court on September 29, 1977 in conformity with the Memorandum of Decision and Order of the district judge dated September 28, 1977.¹

¹ The order and the unreported opinion are set forth in the Joint Appendix at A. 844 and A. 846 respectively.

The sole issue presented on appeal is whether the district court abused its discretion or committed a clear mistake of law in denying the preliminary injunction.

Statement of the Case

The 22 named plaintiffs are servicemen who are listed as missing in action ("MIA") in Southeast Asia or who were listed as missing in action and have since been declared dead.

Represented by their "next friends", plaintiffs brought this action on September 2, 1977, on behalf of themselves and all others similarly situated, alleging that sections 555 and 556 of Title 37 are unconstitutional on their face and as applied because, *inter alia*, they fail to afford the MIA or a suitable representative notice and an opportunity to be heard prior to a change in the MIA's status. Thereafter, on September 12, 1977, a temporary restraining order was entered enjoining the Service Secretaries from proceeding with status reviews until a determination could be made on an application for a preliminary injunction.

On September 23, 1977, the district court, after a four day evidentiary hearing and consideration of the supporting documentary material and affidavits, denied plaintiffs' motion for a preliminary injunction, denied a cross-motion by defendants to dismiss for failure to state a claim upon which relief can be granted, authorized plaintiffs to take one more deposition, and directed defendants to make a motion for summary judgment within 30 days (A. 735-736, 747). This appeal followed.

Statement of Facts

In August 1977, the Government announced that the military Service Secretaries would resume status reviews under 37 U.S.C. §§ 555 and 556 of the cases of all service-

men listed as missing in action in Southeast Asia, starting with the cases of those who have been missing the longest, to determine whether the servicemen should be continued in a captured or missing status or reclassified as deceased (A. 90-91). Status reviews, with the exception of those requested by next of kin, had been halted since mid 1973 for reasons which included litigation, investigations (e.g. Montgomery Commission, Woodcock Commission), and diplomatic approaches (A. 86-91).²

The decision to resume status reviews, which followed unprecedented efforts to account for the missing in action, rested in part on a finding of no credible evidence to indicate that any American servicemen are alive and being held against their will in Southeast Asia, recommendations by congressional committees, and the strong sentiment expressed by many MIA families that the Government should exercise its responsibility for conducting case reviews. (A. 84-90, 162, 826-827; Final Report of Select Committee on Missing Persons in Southeast Asia, H.R. Rep. No. 94-1764, 94th Cong., 2d Sess. (1976), pp. 149, 185-187, 238, 240-241, 243).³

² The status reviews in issue are not the mandatory twelfth month review (37 U.S.C. § 555(a)). In each case a twelfth month review was conducted which resulted in the continuation of the serviceman in a missing status.

Such reviews rarely resulted in a change of status because the Government preferred to wait in the hope that definitive information would be available after the hostilities (Hearings before the House Select Committee on Missing Persons in Southeast Asia, 94th Cong. 2d Sess. (1976), Part 4, p. 27; Final Report, p. 179). The effect of this policy and the moratorium is that the average serviceman in a missing in action status has been missing ten years (Final Report, p. 238).

³ Hereinafter, references to the Hearings and Final Report of the Select Committee on Missing Persons in Southeast Asia will be cited as Montgomery Commission Hearings or Final Report with appropriate volume and page numbers.

At the evidentiary hearing, which began on September 19, 1977 and lasted for four days, representatives of the various Services testified that next of kin currently receiving governmental financial benefits that could be terminated by a status review are afforded notice and an opportunity to attend a status review, with counsel, if they choose (A. 490-491, 609, 625, 628). In those instances where there is no next of kin receiving benefits, these rights are afforded to the primary next of kin (see 10 U.S.C. § 2771) as if they were receiving benefits (e.g., parents of a single serviceman who are nondependent, but who are the primary next of kin) (A. 491-494, 609, 625, 628). This testimony was further substantiated by documentary material and affidavits (A. 104-105, 108, 111-116, 122-123, 136-137, 142, 147-149).

Prior to the status review hearing, the case file, on which the review is based, is made available to those persons entitled to notice and an opportunity to be heard (A. 100, 109, 115, 123, 143, 534, 608, 625, 628-629). This is the same case file that many families have previously seen at service headquarters and at National League of Families Conventions or have had mailed to them over the years (A. 575-576, 623; Montgomery Commission Hearings, Part 1, p. 55, Part 4, p. 15; Final Report, p. 63).⁴

The case file contains all the information relating to the serviceman's status. It includes combat action reports describing the circumstances of loss, search-and-rescue efforts that have been conducted, testimony of eyewitnesses, debriefings of returned prisoners of war, re-

⁴ Although some families previously have not seen the case file, in each instance the primary next of kin has been given all the significant information pertaining to the serviceman's status (A. 109, 576; Montgomery Commission Hearings, Part 1, p. 55).

ports of investigative boards, information gathered by intelligence agencies (e.g., Defense Intelligence Agency) that correlate or may correlate to the loss of the individual, information obtained by the State Department through negotiation efforts, information from the Joint Casualty Resolution Center that relates to possible recovery of remains, and any other information that might pertain to the individual's loss (A. 108-109, 123, 142-143; Montgomery Commission Hearings Part 3, p. 12; Final Report, p. 177; Plaintiffs' Exhibit 11A & B; Defendants' Exhibit B). In those instances where there are classified intelligence reports which cannot be included in the case file, the substance of the report, excluding the source and method of collection, has been extracted and is in the file (A. 86, 109, 143, 562-566, 616-618; Montgomery Commission Hearings, Part 1, p. 56, Part 3, p. 6, Final Report, pp. 160-162).⁵ All the files have been carefully reviewed to ensure that all the information available anywhere in the Government is there (A. 100, 520, 526; Montgomery Commission Hearings, Part 1, p. 17 and Part 3, p. 12).⁶

The hearing is conducted by one or more hearing officers, depending on the service (A. 100, 108, 124, 508-509, 607-608, 625, 628). Persons entitled to notice and an opportunity to be heard may present any evidence that they consider relevant (A. 101, 108, 124, 143, 591, 613). Upon completion of the hearing, the hearing officer(s) forwards the file, the evidence, if any, submitted by the

⁵ Over the years many of the documents have been declassified with the result that the file now contains the original source document as well as the extract (A. 570, 615).

⁶ Although there are millions of reports, etc., there is no mass of unexamined material. All reports, etc., have been examined at least once. There are, however, a lot of general reports which do not pertain to anyone in particular which have not been put in anyone's file (Montgomery Commission Hearings Part 1, p. 42, Part 3, p. 12).

next of kin, the hearing record, and a recommendation to a review board (A. 101, 110, 124, 144, 632). The review board is composed of experienced combat officers (A. 110, 144, 509-510, 607-608). After the review board has reviewed the case and made a recommendation, the entire case is transmitted through administrative channels to the Service Secretary or his designee, who makes the final determination (A. 102, 110, 124, 144, 511, 608). Although 37 U.S.C. § 556 authorizes a finding of death when, on the basis of the information received or a lapse of time without information, a serviceman can reasonably be presumed to be dead, a member's status is not changed unless the evidence is overwhelming that he is dead (A. 597).

In those cases where the next of kin entitled to notice and an opportunity to be heard waives the right to attend a hearing, the same procedure, minus the hearing, is followed and an independent determination is made (A. 499-500, 632).

When, after a case review, a serviceman is presumed to be deceased and a presumptive finding of death is entered, pay and allowances distributed to the next of kin cease (A. 157, 552; Final Report, pp. 163-164). In those cases where the serviceman's pay and allowances are being deposited in the uniformed services savings deposit program (USSDP), the deposits cease and the money which is in the account is distributed to the designated beneficiary or primary next of kin (A. 553-554; Final Report, pp. 163-164).⁷ However, if a serviceman declared or presumed dead should later return alive, the Service

⁷ The USSDP was instituted in 1966 to allow servicemen serving in a combat zone to deposit portions of their pay and allowances at 10% interest per annum. Pay and allowances to missing servicemen without dependents accrues to their USSDP accounts. *Id.* at 163.

Secretary would reinstate him, pay him his back pay and allowances for the period following the date on which a determination of death was made, with increases calculated for longevity or promotions, and pay him 10% per annum on the money which should have been deposited in his USSDP account (A. 158, 634-637; Final Report, pp. 168, 177). Further, in those cases where the returned serviceman is estranged from the beneficiary of his USSDP account, the Service Secretary will pay the serviceman the amount which was erroneously paid out (A. 635-636, 681, 552-555).

Mr. Frank Sieverts, Deputy Coordinator for Prisoner of War and Missing in Action Matters, Department of State, testified that the Government has repeatedly pressed for an accounting of MIA's but with very limited results (A. 93, 649-652, 660-662, 92, 676). He also testified that the decision to resume status reviews does not affect the Government's commitment to obtain as full an accounting as possible (A. 93, 676; see also A. 89-90). Indeed, a team, of which Mr. Sieverts is a member, was scheduled to go to Hanoi on September 30, 1977 to receive the remains of 22 Americans as to whom information had been released in June meetings between United States and Vietnamese officials (A. 90, 407). Mr. Sieverts further stated that in its accounting efforts, the Government draws no distinction between those listed as missing and those declared or presumed dead (A. 92, 663). It does not inform the Indochina governments of a change in the serviceman's status (A. 663-664). As to the Indochina governments, they have shown a complete unawareness of the serviceman's status (A. 664-665). Indeed, approximately half of those servicemen for whom information and remains have been returned have been servicemen already in the killed or presumed dead category (A. 92; Final Report, p. 188). Moreover, the Vietnamese have repeatedly stated that all prisoners captured during

hostilities have been released (A. 93, 655, 657; Final Report, p. 189). Finally, our Government has no evidence that any serviceman is alive and being held against his will in Southeast Asia (A. 90, 93, 668-669; Final Report, p. 238).

Affidavits and documentary evidence show that many families of missing servicemen desperately want status reviews but feel that it is cruel and inhuman to require them to initiate such reviews (A. 160-162, 826-827; Final Report, pp. 183-187; Montgomery Commission Hearings, Part 2, pp. 43-44).

Two of the witnesses produced by plaintiffs, Mrs. Mary K. Bosiljevac, the wife of an MIA, and Mr. George Brooks, the father of an MIA, testified regarding the alleged inadequacies of their relative's case file. The files were produced and examined by Judge Weinstein (Plaintiffs' Exhibit 11A & B; Defendants' Exhibit B). Judge Weinstein, after examining the Bosiljevac case file, stated that the discrepancies were minor and characterized the file as a painstaking attempt to gather the information necessary to determine Captain Bosiljevac's status (A. 397, 399-400). The court also examined the classified Defense Intelligence Agency (DIA) file and stated that the substance of the classified file was in the case file and that the DIA file was properly classified (A. 725).

In his decision denying the preliminary injunction, Judge Weinstein found that plaintiffs had shown no facts that would entitle them to relief; that there was no indication that any legal rights or moral claims of these men or their relatives had or would be violated; and indeed, that defendants had shown a "compassionate regard" for the rights of the missing servicemen and their relatives (A. 846-853). The court went on to hold that procedural safeguards were adequate (A. 853). Further-

more, the court stated that in view of the decisions in *McDonald v. McLucas*, 371 F. Supp. 831 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 987 (1974), which limit notice and an opportunity to be heard to those next of kin currently receiving governmental financial benefits, it is "highly doubtful" that there is a cause of action here. Indeed, Judge Weinstein said, "It can be argued with considerable force that this action is an attempt to circumvent the decisions in that litigation." (A. 849). Finally, Judge Weinstein indicated that he was denying defendants' motion to dismiss for failure to state a claim upon which relief can be granted and directed the defendants to make a motion within 30 days for summary judgment in order to give the plaintiffs adequate opportunity to respond (A. 736).

ARGUMENT

POINT I

The court below correctly found that there was no probability of success on the merits.

A. This action is foreclosed by *McDonald v. McLucas*.

As Judge Weinstein indicated, *McDonald v. McLucas*, *supra*, 371 F. Supp. 831 (S.D.N.Y. 1974) (three-judge court), *aff'd mem.*, 419 U.S. 987 (1974), is dispositive of the question of the category of persons entitled to notice and an opportunity to be heard as well as the form of the hearing that must be afforded.

In *McDonald*, the next of kin of five servicemen listed as missing in action in Southeast Asia sued on behalf of "all next of kin, both in their capacities as representatives of their respective MIA's and with respect to their indi-

vidual interests", claiming that 37 U.S.C. §§ 555 and 556 were unconstitutional because, *inter alia*, they did not afford them notice and an opportunity to be heard at status review proceedings. 371 F. Supp. at 833. "Next of kin" was defined to include spouses, children, parents, brothers, and sisters of MIAs, whether or not they were receiving governmental financial benefits. *Id.* at 837. The three-judge court, however, held that only those next of kin currently receiving governmental financial benefits were entitled to notice and mandated the form of hearing which is currently provided to those next of kin. (See copy of decree reprinted in Final Report, p. 181 and Service regulations reprinted at A. 104-105, 111-116, 136-137, 147-149.) The court also refused to certify a class, stating that "a class action here would be largely a formality." *Id.* at 833.

On appeal to the Supreme Court, the plaintiffs asserted that the district court had erred in failing to recognize the rights of the MIA and challenged the nature of the hearing (A. 859-877). As Judge Weinstein acknowledged, the Supreme Court, by summarily affirming the decision of the three-judge court, upheld the lower court's ruling that only those next of kin currently receiving governmental financial benefits have standing to challenge sections 555 and 556 of Title 37 and approved the form of the hearing required by the lower court. *Hicks v. Miranda*, 422 U.S. 332, at 343-345 (1975); *Ohio v. Price*, 360 U.S. 246, 247 (1959); *Russo v. Vacin*, 528 F.2d 27, 29 (7th Cir. 1976); *Hogge v. Johnson*, 526 F.2d 833, 835 (5th Cir. 1975).

Plaintiffs' contention that *McDonald* is not dispositive because the three-judge court refused to certify a class is spurious. The only effect that that denial has here is to preclude defendants from pleading *res judicata*. The denial does not make *McDonald* any less binding a precedent. Indeed, as previously indicated, the three-judge

court denied class certification in *McDonald* precisely because it considered that its decision in that case would be determinative of the constitutional issues raised. *Id.* at 833.

B. Plaintiffs would not be adversely affected by a status change.

As a prerequisite to invoking the procedural due process guarantees of the Fifth Amendment, an individual must demonstrate a threat to a protected property interest. *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972). In this action, as Judge Weinstein noted, the MIA plaintiffs did not and cannot establish the existence of a property interest that would be adversely affected by a status review.

The sole purpose of sections 555 and 556 is to afford some financial support to the dependents of servicemen reported as missing during the period that the status of these servicemen is undetermined. *Bell v. United States*, 366 U.S. 393, 408-410 (1961); *McDonald v. McLucas*, *supra*, 371 F. Supp. at 833; *Crone v. United States*, 538 F.2d 875 (Ct. Cl. 1976). Although plaintiffs frequently attempt to obfuscate this fact, the fact remains that the interest of the dependents in the uninterrupted continuation of their entitlement, which is protected by Service regulations, is not in issue here.

The only interest that a serviceman missing in action has is to recover, upon his return, the pay and allowances which are rightfully his. *Crone v. United States*, *supra*, 538 F.2d at 882. The record is replete with evidence which shows, as Judge Weinstein found, that this interest will not be adversely affected by a status change. The testimony clearly shows that if a serviceman returns, the Service Secretaries are authorized to (37 U.S.C. § 556 (d)), and will, reinstate him, pay him back pay and allowances for the period following the date on which a determination of death was made, with increases calcu-

lated for longevity or promotions, and pay him 10% per annum on the money which should have been deposited in his USSDP account (A. 158, 634-637; Final Report, pp. 168, 177). Further, in those instances where the returning serviceman has become estranged from the recipient of his USSDP account, the Service Secretary will pay the returning serviceman the amount which was erroneously paid out (A. 635-636, 681, 552-555). Moreover, the returning serviceman also has ample administrative remedies in the form of an appeal to the Correction Board (10 U.S.C. § 1552) and judicial remedies.* See *Crone v. United States*, *supra*, 538 F.2d at 882.

Defendants are not precluded, as plaintiffs allege, from paying the returned serviceman the 10% per annum interest which he should receive on pay and allowances that should have been, but that because of an erroneous determination were not, deposited in his USSDP account. The cases cited by plaintiffs at page 52 of their brief are inapposite here because the serviceman is expressly entitled by statute to deposit his money and receive 10% per annum interest. See *Albrecht v. United States*, 329 U.S. 599, 605 (1947). Phrased another way, the issue is not whether he can recover interest from the Government on a claim; the serviceman's claim is to the interest. Equally spurious is the argument that 10 U.S.C. § 2771 precludes defendants from paying the returned serviceman the amount in his USSDP account which was erroneously distributed. As the court found in *Howell v. United States*, 159 F. Supp. 597 (Ct. Cl. 1958), an erroneous payment does not discharge an obligation owed by the Government.

* A failure by the Correction Board to order reinstatement with back pay, etc. would constitute a clear abuse of discretion reversible in Court.

Plaintiff's contention that the MIA is entitled to notice and an opportunity to be heard because he has a right to an accounting, which could be adversely affected by a status change, is both legally and factually incorrect. At the outset, it should be emphasized that the challenged statutes do not require an accounting. Nor are plaintiffs entitled to an accounting under any other statute. However, the record is replete with evidence which shows, as Judge Weinstein properly found, that the Government will not cease its efforts to obtain as full an accounting as possible of servicemen, whether in a missing or killed in action status, and that the Indochina governments will not make less of an accounting whatever the United States classification may be (A. 89, 90, 92-93, 676, 663-66; Final Report, pp. 188-190).

The only evidence offered by plaintiffs to refute the latter fact is a 1973 affidavit from Stephen R. Frank, former Director of Operations for Voices in Vital America (VIVA), regarding a conversation Mr. Frank allegedly had with a Vietnamese official in 1973, in which the official purportedly stated, "[W]e do not know why you are here because your government considers all these men dead" (A. 80 *et seq.*). However, as the Montgomery Commission, which considered the same testimony, found: VIVA was a private and (from the Vietnamese standpoint) unpopular organization; Mr. Frank had no official standing; the Vietnamese have never distinguished in official discussions or in returning remains, between Americans classified as MIA and those known or presumed dead; and, in fact, the Vietnamese have publicly stated that they hold no live prisoners of war (Final Report, pp. 188-189).

The Montgomery Commission also considered and properly rejected plaintiffs' argument that a resumption of status reviews is arbitrary and capricious because the Government is on the verge of a complete accounting. As the Montgomery Commission noted, the average MIA has

been missing for about nine years (as of 1976 when the Commission wrote its report) and there is an evidentiary basis in many cases for a change in status.⁹ Further, an accounting has been supposedly imminent for years. However, in reality it has and will continue to be a painfully slow and arduous process (Final Report, p. 189, 202-204). The evidence submitted at the hearing in this case shows that the situation has not changed (A. 649-652, 661-662).

Nor is there merit to the argument that plaintiffs are entitled to notice and an opportunity to be heard because a change of status could adversely affect their chances of survival. There is not one shred of evidence in the record to support even a suggestion that an MIA's chances of survival (assuming of course that anyone is alive and there is no evidence to indicate this) would be affected by a status review.¹⁰ Plaintiffs' assertion that government witnesses conceded this point is a blatant misrepresentation of the actual testimony (A. 666-669, 589).¹¹

C. The hearing afforded is adequate.

Even if plaintiffs have a property interest which could be adversely affected by a status review, which they plainly do not, the hearing provided, as Judge Weinstein properly found, comports with procedural due process requirements (A. 853).

⁹ The Montgomery Commission examined over 200 individual files (Final Report, p. 65; see also A. 386).

¹⁰ While some individuals may have believed this during the war, the fact is that at the time of repatriation in 1973, men returned who had been declared killed in action and who had never been placed in a missing status (A. 636; Final Report, p. 168).

¹¹ The testimony referred to at page 667 of the Joint Appendix is that the Government, during the early part of the war, tended to put men in an MIA status even though there was no real evidence to support such a determination. This was done based solely on hope and a belief that it might force the Vietnamese to provide information (A. 666-669; see also A. 589).

The failure to provide the MIA or a special representative notice and an opportunity to be heard does not, as plaintiffs assert, violate procedural due process. Any interests of the serviceman are adequately protected by the next of kin to whom notice and an opportunity to be heard are currently provided. The fact that the next of kin does not oppose a status review or has even waived the right to appear at a hearing does not, as plaintiffs assert, indicate that the next of kin is "necessarily antagonistic to the MIA's interests" (A. 42). Such a conclusion is grossly unfounded. As the evidence shows, the next of kin may decline a hearing for any number of valid non-antagonistic reasons, including a belief that the serviceman is dead, that the Service is best equipped to make the required judgments, and that the serviceman would not have wanted to be carried indefinitely in an MIA status (A. 162, 826-827; Final Report, p. 185). Furthermore, in every instance the Service Secretary makes an independent determination (A. 499-500, 632).

Similarly, the absence of an adversarial, trial type hearing does not deprive plaintiffs of due process of law. For a number of readily apparent reasons, it is clear that such a hearing, which to date the Supreme Court has only seen fit to require in *Goldberg v. Kelly*, 397 U.S. 254 (1973), where brutal need was in issue, is not, under the standards enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), required here. First, there are no issues of credibility and veracity to be resolved. The persons from whom first hand reports were obtained were in most instances fellow servicemen who had no self-serving interests. Indeed, if anything, it appears that some of these servicemen were unjustifiably optimistic in their reports (Final Report, pp. 178, 158). Second, the next of kin who are afforded the review have little if any information to offer. As the evidence shows, any significant information pertaining to the MIA's status was

acquired from the exhaustive efforts of the Services and the State Department. Third, there is little likelihood of error as demonstrated by past statistics. (See Final Report, p. 139.) Fourth, the interests of the Services are not antagonistic to the rights of the MIA. To the contrary, the Services are as committed to determining what happened to the serviceman as are the next of kin (A. 381-383). In view of the above, the procedural safeguards afforded, which approximate those provided at other administrative hearings, clearly comport with procedural due process.

Plaintiffs' contention that sections 555 and 556 are unconstitutional because of a total absence of standards and criteria is totally lacking in merit. Section 556 authorizes a presumptive finding of death where on the basis of all the information available including the passage of time without information, the serviceman can reasonably be presumed to be dead. As was contemplated by Congress (see, e.g., H.R. Rep. No. 1674, 78th Cong., 2d Sess. 1974), each case is reviewed by men with combat experience (A. 110, 144, 509-510, 594-595, 607-608). They consider all of the evidence, including the passage of time without information (A. 590).¹² Moreover, although section 556 authorizes a presumptive finding of death when a serviceman can reasonably be presumed to be dead, a member's status is not changed unless the evidence is overwhelming that he is dead (A. 597).¹³

¹² Although plaintiffs' representatives refuse to recognize this, the passage of time without information is significant in trying to determine whether it is reasonable to presume that a missing serviceman is dead. See Montgomery Commission Hearings Part 4, p. 25. However defendants do not, as plaintiffs' representatives erroneously assume, consider the passage of time without information to be conclusive without more. *Id.*

¹³ Plaintiff's assertion that the Secretary of Defense cannot oversee the actions of the Service Secretaries is wholly without merit. See 10 U.S.C. §§ 133 *et seq.*

Equally spurious is plaintiffs' assertion that the next of kin are precluded from protecting the rights of the MIA by the routine suppression and withholding of information. The evidence shows that all the information relevant to the serviceman's status is put in the case file and that the case file is made available to the next of kin entitled to notice and an opportunity to be heard (A. 100, 108-109, 123, 142-143, 397, 623; Plaintiffs' Exhibit 11A & B; Final Report, pp. 66-72, Montgomery Commission Hearings, Part 3, pp. 12 & 28).

POINT II

The court below properly found that plaintiffs would suffer no irreparable injury.

As previously indicated, an MIA's only interest under the challenged statutes is to recover upon his return all the salary and allowances owed him. Inasmuch as the evidence conclusively establishes that plaintiffs will be paid all salary, allowances and other benefits due them, if they return, the court's finding that plaintiffs would not suffer irreparable injury must be affirmed.

The contentions that the court wrongfully refused to allow evidence on the question of irreparable injury and ignored the evidence that was submitted, reflect a fundamental misapprehension as to (1) the nature and effect of the challenged statutes and (2) the identity of the plaintiffs. As previously demonstrated, the Missing Persons Act, 37 U.S.C. §§ 551 *et seq.*, is nothing more than a military pay statute. It governs the circumstances under which servicemen missing in action may be declared dead for purposes of military pay and death gratuities. *Bell v. United States, supra*, 366 U.S. 393 (1961). The plaintiffs here are the MIAs themselves and not the next of kin. Thus, plaintiffs' assertion that the court should

have permitted testimony offered to show the effects of the statute on the distribution of non-governmental assets is plainly incorrect. Non-governmental assets are not in issue. A determination of death under sections 555 and 556 is only "conclusive on all other departments and agencies of the United States." (555(c) and 556(h)). There is no evidence that Congress intended, nor have any states construed, the conclusive language of sections 555 and 556 to have binding effect for other non-governmental purposes. Nor was it error for the court to reject testimony from the wife of an MIA which was offered to show that the Defense Department had wrongfully refused to reverse a determination and reinstate benefits to the next of kin (A. 330). As the court properly noted, such testimony has no relevance to the central question in the case, to wit: will a *serviceman who returns* be given all the pay and allowances which would have been credited to his account had he remained in a missing status. (A. 485). Likewise, testimony on the matter of the cost of the hearing to the next of kin was totally irrelevant.

In sum, since the plaintiffs, despite the fact that they were given every opportunity, only produced evidence which led the very sympathetic district judge correctly to conclude that "[t]he suggestion that there will be any damage to those reclassified as killed in action if they return is hypothetical, of miniscule probability and completely without merit", the denial of plaintiffs' motion for a preliminary injunction was wholly proper (A. 851).

CONCLUSION

The order of the District Court denying a preliminary injunction should be affirmed.

Dated: Brooklyn, New York
January 30, 1978

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 2nd day of February 19 78 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Dermot Foley, Esq., 122 East 42nd Street, New York, N.Y. 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Sworn to before me this

2nd day of February 1978

OLGA S. MORGAN
Notary Public, State of New York
No. 24,450,1966
Qualified in Kings County
Commission Expires March 30, 1979